



# RULE-MAKING ORDER

**CR-103E (May 2009)**  
(Implements RCW 34.05.360)

**Agency:** Washington Department of Fish and Wildlife

**Emergency Rule Only**

**Effective date of rule:**

**Emergency Rules 10-88**

☐ Immediately upon filing.

☒ Later (specify) May 10, 2011

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

☐ Yes

☒ No

If Yes, explain:

**Purpose:** The purpose of this rule-making is to allow non-treaty commercial fishing opportunity in the Columbia River while protecting fish listed as threatened or endangered under the Endangered Species Act. This rule-making implements federal court orders governing Washington's relationship with Treaty Indian Tribes, federal law governing Washington's relationship with Oregon, and Washington Fish and Wildlife Commission policy guidance for Columbia River fisheries.

**Citation of existing rules affected by this order:**

Repealed: WAC 220-33-03000G

Amended: WAC 220-33-030

Suspended:

**Statutory authority for adoption:** RCW 77.04.130, 77.12.045, and 77.12.047

**Other authority :** United States v. Oregon, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 United States v. Oregon Management Agreement (Aug. 12, 2008) (Doc. No. 2546); Northwest Gillnetters Ass'n v. Sandison, 95 Wn.2d 638, 628 P.2d 800 (1981); Washington Fish and Wildlife Commission policies concerning Columbia River fisheries; 40 Stat. 515 (Columbia River Compact).

**EMERGENCY RULE**

Under RCW 34.05.350 the agency for good cause finds:

- ☒ That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- ☐ That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.
- ☐ That in order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency.

Reasons for this finding: (See Attachment)

**Date adopted:** May 6, 2011

**NAME (TYPE OR PRINT)**

Philip Anderson

**SIGNATURE**

**TITLE**

Director

**CODE REVISER USE ONLY**

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

**DATE:** May 06, 2011

**TIME:** 2:08 PM

**WSR 11-11-010**

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.**

**The number of sections adopted in order to comply with:**

<b>Federal statute:</b>	New	<u>1</u>	Amended	_____	Repealed	<u>1</u>
<b>Federal rules or standards:</b>	New	<u>1</u>	Amended	_____	Repealed	<u>1</u>
<b>Recently enacted state statutes:</b>	New	_____	Amended	_____	Repealed	_____

**The number of sections adopted at the request of a nongovernmental entity:**

New	_____	Amended	_____	Repealed	_____
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**The number of sections adopted in the agency's own initiative:**

New	<u>1</u>	Amended	_____	Repealed	<u>1</u>
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**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

New	_____	Amended	_____	Repealed	_____
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**The number of sections adopted using:**

<b>Negotiated rule making:</b>	New	_____	Amended	_____	Repealed	_____
<b>Pilot rule making:</b>	New	_____	Amended	_____	Repealed	_____
<b>Other alternative rule making:</b>	New	_____	Amended	_____	Repealed	_____

## NEW SECTION

### **WAC 220-33-03000G Commercial shad—Columbia River.**

Notwithstanding the provisions of WAC 220-33-030:

#### **1. Washougal Reef.**

- a. Area: Waters of Zone 4-5 inside a line commencing at the white six-second equal-interval light approximately  $\frac{3}{4}$  miles east of the Washougal Woolen Mill pipeline and projected westerly to the Washougal blinker light, thence to the four-second blinker light on the east end of Lady Island, thence easterly and along the shoreline of Lady Island to the State Highway 14 Bridge, thence easterly across the State Highway 14 Bridge to the mainland.
- b. Season: Monday through Friday from May 10 through June 20, 2011, except closed on the observed Memorial Day holiday. Open hours are 8:00 p.m. to 12:00 a.m.
- c. Gear: Drift gill net only. Single-wall, unslackened, floater gill net, with breaking strength of less than 30 pounds. Mesh size: 5  $\frac{3}{8}$  inches to 6  $\frac{1}{4}$  inches.
- d. Allowable Sales: Only shad may be kept and sold. All salmonids, walleye and sturgeon must be immediately returned to the water and those alive must be released unharmed.

#### **2. Mainstem Columbia River**

- a. Stipulations: Shad may be taken and sold for commercial purposes with experimental fishing gears. A permit issued by the State of Oregon as described in the Oregon Administrative Rule 635-006-0020 is required to use experimental gear types for shad. Conditions under which shad may be taken and sold for commercial purposes will be specified in the permit.
- b. Area: SMCRA 1A-1E
- c. Season: May 16-July 15, 2011
- d. Gear: experimental
- e. Allowable Sales: Only shad may be kept and sold. All salmonids, sturgeon, and non-target species taken as incidental catch in operation of such gear shall immediately, with care and least possible injury, be released and transferred to the water without violence.

## REPEALER

The following section of the Washington Administrative Code is repealed effective July 16, 2011:

WAC 220-33-03000G Commercial Shad—Columbia River.

## Attachment

Sets the standard shad commercial fishery in the Washougal Reef. Harvestable numbers of shad are expected, and industry has expressed interest in fishing in the reef as market strength has improved. Allows the sales of shad caught with an experimental gear permit issued by the State of Oregon. Washington supports innovative fishing techniques for shad. Experimental gear (purse seine) is expected to be fished mainly in the area of Skamokawa, WA. Incidental impacts to non-target species are expected to be minimal, and are covered in a Biological Opinion. This rule is consistent with actions of the Columbia River Compact hearing of May 4, 2011, and is consistent with requirements of the Endangered Species Act (ESA). There is insufficient time to promulgate permanent regulations.

Washington and Oregon jointly regulate Columbia River fisheries under the Congressionally-ratified Columbia River Compact. Four Indian Tribes have treaty fishing rights in the Columbia River. The treaties preempt state regulations that fail to allow the Tribes an opportunity to take a fair share of the available fish, and the states must manage other fisheries accordingly. Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969). A federal court order sets the current parameters for sharing between treaty Indians and others. United States v. Oregon, Civil No. 68-513-KI (D. Or.), Order Adopting 2008-2017 United States v. Oregon Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

Some Columbia River Basin salmon and steelhead stocks are listed as threatened or endangered under the federal Endangered Species Act. On May 5, 2008, the National Marine Fisheries Service issued a biological opinion under 16 U.S.C. § 1536 that allows for some incidental take of these species in treaty and non-treaty Columbia River fisheries governed by the 2008-2017 U.S. v. Oregon Management Agreement. The Washington and Oregon Fish and Wildlife Commissions have developed policies to guide the implementation of such biological opinions in the states' regulation of non-treaty fisheries.

Columbia River non-treaty fisheries are monitored very closely to ensure compliance with federal court orders, the Endangered Species Act, and Commission guidelines. Because conditions change rapidly, the fisheries are managed almost exclusively by emergency rule. Representatives from the Washington and Oregon Departments of Fish and Wildlife convene public hearings and take public testimony when considering proposals for new emergency rules. WDFW and ODFW then adopt regulations reflecting agreements reached.

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**EMERGENCY RULE ONLY**

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9 (b) That state or federal law or federal rule a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

**Reasons for this finding:**